

No. 2098

**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COM-
PANY, a corporation,

Plaintiff

vs.

TONY CURTZ, a minor by AGNES CURTZ,
his Guardian ad Litem,

Defendant

TRANSCRIPT OF RECORD

Upon Writ of Error from the United States Circuit
Court for the Western District of Washington,
Western Division

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JAN 29 1911

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No. _____

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Names and Addresses of Attorneys

GEORGE T. REID, Esquire, Northern Pacific
Headquarters Building, Tacoma, Washington,

J. W. QUICK, Esquire, Northern Pacific Headquar-
ters Building, Tacoma, Washington, and

L. B. DA PONTE, Esquire, Northern Pacific Head-
quarters Building, Tacoma, Washington,

Attorneys for the Plaintiff in Error.

HEBER McHUGH, Esquire, New York Block,
Seattle, Washington,

JOHN T. CASEY, Esquire, New York Block,
Seattle, Washington, and

CHARLES O. BATES, Esquire, National Realty
Building, Tacoma, Washington,

NEWTON H. PEER, Esquire, National Realty
Building, Tacoma, Washington, and

CHAS. T. PETERSON, Esquire, National Realty
Building, Tacoma, Washington,

Attorneys for the Defendants in Error.

Stipulation

It is hereby stipulated by the parties hereto that the Clerk of the above entitled Court in printing the record may omit the designation of the Court, the title of the case, verifications and endorsements except on the first page.

HEBER McHUGH,

JOHN T. CASEY,

CHARLES O. BATES,

Attorneys for Plaintiff.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT,

Western District of Washington

NOV 18, 1911.

JAMES C. DRAKE, Clerk.

By Albert P. Close, Deputy.”

Complaint

Plaintiff complains of the above named defendant and for his cause of action alleges, avers and states:

I.

That on or about the day of October, 1910, Agnes Curtz, was duly appointed guardian of the above named plaintiff Tony Curtz; that said plaintiff is an infant of the age of thirteen years and now resides in the City of Tacoma, Pierce County, Washington.

II.

That the defendant, Northern Pacific Railway Company, is a corporation organized and existing under the laws of the State of Wisconsin, and at the times hereinafter mentioned, owned and operated a railway line, and railway yards in the City of Tacoma, Pierce County, Washington.

III.

That on or about the 12th. day of September, 1908, said defendant owned and held on its switches in said Tacoma, and along on Dock Street near 11th. St., three or four empty cars and that said cars had recently been unloaded of wheat, and that there was more or less loose wheat lying on floors of said cars; that the said defendant customarily stored cars from which wheat had been unloaded on the track where said cars before mentioned were stored, and the fact that said defendant so stored said cars, and that said cars contained more or less loose wheat left in and lying on the floors of said cars, was well

known to a great many people, including men, women and children residing in said city; that the wheat left in said cars were uninjured and after being collected by sweeping the floors of said cars, found ready sale in said city for chicken feed; that this fact was well known to said defendant, at all times hereinafter mentioned.

IV.

That the place where said cars were stored was under a bridge about fifty feet high, running from the end of 11th. St. at the Perkins Building, in Tacoma towards the tide-flats and the mills and factories situated in said latter locality; that a dock, street and highway ran parallel to the tracks of said defendant along under said bridge by the place where said cars were stored; that said street was used by a multitude of people and a great number of teams; that said street led to ware-houses, to merchandise docks and to passenger docks situated near the section house under said 11th. St. bridge; that a portion of said street east of said railway tracks was planked right up to the said railway tracks and the cars were unloaded onto wagons customarily and usually at about the place where said cars were stored. That the dock where all excursion boats and the small gasoline craft came to said city and where private and public yachts discharged and received passengers was located within about 50 feet from the place where said cars were stored, and people, in going to and from said dock, passed by said storage track at all hours of the day and night; that

there were tracks and pathways used by a great number of people landing down the west bank of said right of way from said City of Tacoma and onto and across the tracks immediately west of said storage track and said pathways were used and employed by a great number of pedestrians in going down to said docks, warehouses, and into other parts of said yards and along said water front daily and hourly, said pathways being most accessible and easy of descent from said city, and that said pathways had been in use to the knowledge of said defendant for many years immediately preceding the times mentioned, all to the knowledge of said defendant.

That because of the loose wheat left in said cars as aforesaid, at said place, a great number of people, including boys of tender years, were at the times herein mentioned, and for a long time before, accustomed to boarding said cars each and every day and hour when they stood on said storage tracks, and sweep the said wheat thereon and remove it therefrom; that this was done to every car so switched in, and said defendant well knew the same to be a fact, and permitted and licensed and encouraged said people, including boys of tender years, to so enter said cars and sweep up and remove the wheat therefrom.

V.

That it was the duty of said defendant, because of the premises aforesaid, not to move or switch said cars from a standing position without first examin-

ing to see whether boys of tender years and immature years, judgment and discretion, were therein for the purpose of sweeping said wheat or observing others engaged in said work; and to warn children, if any were found thereon, away from said cars before switching the same or before moving the same from a stationary position; it was also the duty of said defendant, because of the premises aforesaid, and because of the dangers which were liable to arise in case said cars were switched without the knowledge of said children, and also because of the immature judgment and discretion of said children, the same would not be conscious of the dangers which might arise in case said cars were switched without the knowledge of said children, and also because of the immature judgment and discretion of said children, the same would not be conscious of the dangers which might arise in case cars were moved while they were within the same, and because said defendant had allowed, and encouraged and licensed said infants of immature judgment and discretion to frequent said storage tracks and to enter said cars and sweep the wheat therein and remove the wheat therefrom, for a long time prior to the dates mentioned herein; to keep said children away from said cars and from said yards and not allow them to get upon said cars for the purpose of sweeping said wheat or to be or remain in or about the immediate neighborhood of said cars, well knowing that said cars would not remain standing any great length of time, and also knowing that said infants,

because of their immature judgment and discretion and tender years were incapable of and did not appreciate the dangers of being in, about and upon said cars.

VI.

That the plaintiff, Tony Curtz, at the time hereinafter mentioned, to-wit: September 12, 1908, was about 11 years of age; that he was carelessly and negligently, invited, encouraged and permitted by defendant to board one of its said box cars so standing on said storage tracks containing loose wheat as aforesaid for the purpose of sweeping said wheat and observing sweep wheat in said cars; that said Tony Curtz was of immature judgment and discretion as to be totally unaware of any dangers connected with being in, on or about said cars and such immature condition was well known to said defendant at said time and place. That when plaintiff and the other boys were in said car the servants and employees of said defendant, knowing that said boys were in said car and in a dangerous position and knowing of the immaturity of said plaintiff and knowing that the car was about to be moved by the engine of said defendant and that such fact was unknown to said plaintiff and the other boys, negligently failed to warn plaintiff of his danger, and negligently and carelessly propelled a locomotive to which was attached some other cars, with great and unnecessary violence and force against the car in which plaintiff was standing, and thereby caused

the same to be moved suddenly and with great violence, by reason wherefor the said Tony Curtz plaintiff was thrown and caused to fall from said car, through the door of same unto the track in front of the wheels of said car, and said agents and employees of said defendant, knowing that plaintiff so fell from said car on the tracks, by the exercise of reasonable care in the premises, being able to discover and knowing said fact, and by the exercise of reasonable care, being able to know that he was in a position of extreme peril, and unable to extricate himself, carelessly and negligently and wantonly and without regard for the safety of the life and limb of said plaintiff, failed and refused to stop said engine and cars and remove said plaintiff from his perilous position as aforesaid; and negligently failed to warn him in time, and negligently failed to prevent said accident, and continued to move said cars for a long distance, whereby said plaintiff was dragged for a distance of about 500 feet and his right leg run over by the wheels of said car and so injured that the same had to be immediately amputated, and causing plaintiff great pain and anguish, to the great damage of plaintiff in the sum of \$30,000.00.

Wherefore, the plaintiff demands judgment from said defendant in the sum of \$30,000.00 and for the costs and disbursements of said action.

HEBER McHUGH,
JOHN T. CASEY,
Plaintiff's Attorneys.

(Verification by Agnes Curtz.)

(Filed Oct. 13, 1911.)

(Superior Court.)

Petition for Removal

Comes now the petitioner, Northern Pacific Railway Company, defendant in the above entitled action, and respectfully shows and represents to this Honorable Court, as follows:

I.

That the above entitled action is a suit of a civil nature brought to recover the sum of Thirty Thousand Dollars (\$30,000.00) for injuries sustained by Tony Curtz, a minor, at Tacoma, Pierce County, Washington, on September 12, 1908; that this petitioner denies that it is liable for said injuries; and that said cause of action is more fully set out in the complaint in the above entitled action.

II.

That the amount in controversy in the above entitled action, at the time of the commencement of the above entitled action, exceeding and now exceeds, exclusive of interest and costs, the sum of Two Thousand Dollars (\$2,000.00).

III.

That your petitioner, Northern Pacific Railway Company, defendant in the above entitled action, at and before the time of the commencement of the above entitled action, was, since has been and now is a corporation, duly organized and existing under

and by virtue of the laws of the State of Wisconsin, and was at all of said times and still is a citizen and resident of said State of Wisconsin, and was not during any of said times, and is not now a citizen and resident of the State of Washington.

IV.

That the plaintiff in the above entitled action, at and before the time of the commencement of the above entitled action, was, since has been and now is a citizen and resident of the State of Washington.

V.

That the controversy in the above entitled action, and every issue of fact and law therein, is wholly between citizens and residents of different states; that the time of your petitioner, as defendant in the above entitled action, to answer or plead to the plaintiff's complaint has not yet expired and will not expire until the 4th. day of November, 1010.

VI.

That your petitioner herewith offers a good and sufficient bond for its entry in the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, within twenty (20) days after the entry of the order removing this cause to said Court on or before the first day of the next session of said Court, of a copy of the record in the above entitled action and for the payment of all costs that may be awarded in said Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, if said Court shall hold that this

suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this Honorable Court proceed no further herein, except to make the order of removal as required by law and to approve said bond presented herewith, and cause the record herein to be removed to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, and it will ever prays.

NORTHERN PACIFIC RAILWAY COMPANY.

By GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Its Attorneys, Office and Post.

Office Address, Room 17 N. P. Headquarters Bldg.,
Tacoma, Wash.

(Verification by J. W. Quick.)

(Filed Nov. 2, 1910,—Superior Court.)

Bond on Removal

KNOW ALL MEN BY THESE PRESENTS:

That the Northern Pacific Railway Company, a corporation, defendant in the above entitled action and petitioner herein, as principal, and the National Surety Company, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Agnes Curtz, guardian ad litem of Tony Curtz, a minor, plaintiff in the above entitled action, in the

penal sum of Five Hundred Dollars (\$500.00) for the payment whereof, well and truly to be made unto the said Agnes Curtz, guardian ad litem of Tony Curtz, a minor, her heirs, executors, administrators, successors and assigns, said principal and surety bind themselves, their successors and assigns and each of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd. day of November, A. D. 1910.

Upon condition, nevertheless, *what* whereas the said Northern Pacific Railway Company, a corporation, has filed in the Superior Court of the State of Washington, for the County of Pierce, a petition for the removal of that cause therein pending wherein Agnes Curtz, guardian ad litem, of Tony Curtz, a minor, is plaintiff, and the said Northern Pacific Railway Company, a corporation, is defendant to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division.

Now, if the said Northern Pacific Railway Company, a corporation, shall enter in the said Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, within twenty (20) days after the entry of the order removing said cause to said Court or on or before the first day of the next session of said Court, a copy of the record in said cause, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States for the Ninth

Judicial Circuit, Western District of Washington, Western Division, if said Court shall hold that said cause was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force, effect and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
(Corporate Seal.) By Geo. T. Reid, Its Attorney.

NATIONAL SURETY COMPANY,

By W. H. Opie, Attorney in Fact.

Approved this 2nd. day of November, A. D. 1910.

C. M. EASTERDAY,
Judge.

(Filed in Superior Court, Nov. 2, 1910.)

Order of Removal

Upon application of the defendant, Northern Pacific Railway Company, a corporation, and upon the filing of petition and bond praying for the removal of this cause to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, the Court having considered the same, approved said bond and being advised in the premises,

IT IS ORDERED, That the above cause be removed to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, and that the record herein be transmitted by the Clerk of this Court to said Circuit Court of the United States for the Ninth

Judicial Circuit, Western District of Washington, Western Division, without any further proceedings herein.

Dated and signed this 2nd. day of November, A. D. 1910.

C. M. EASTERDAY, Judge.

(Filed in Superior Court Nov. 2, 1910.)

(Filed in Superior Court)

(Nov. 2, 1910.)

(Entered Jour. 130 Dept. 3, Page 70.)

Nov. 2, 1910.

Notice of Removal

TO THE ABOVE NAMED PLAINTIFF and TO HEBER McHUGH and JOHN T. CASEY, her attorneys:

You and each of you will please take notice that on the 2nd. day of November, 1910, an order was entered in the above entitled cause transferring the same from the Superior Court of the State of Washington, for the County of Pierce, to the Circuit Court of the United States for the Ninth Judicial Circuit, Western District of Washington, Western Division, and that the record in said cause has this day been duly filed in the said United States Circuit Court.

Dated this 17th. day of November, 1910.

GEO. T. REID,

J. W. QUICK,

L. D. Da PONTE,

Attorneys for Defendant.

Received a copy of the foregoing notice this 18 day of November, 1910.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

(Filed Nov. 25, 1910.)

Answer

Comes now the above named defendant and for answer to the complaint of the plaintiff, alleges as follows:

I.

For answer to Paragraph I of said complaint, defendant has no knowledge or information concerning the allegations therein contained and therefore denies the same to the extent that plaintiff be required to make proof thereon.

II.

For answer to Paragraph II of said complaint, defendant admits that it is a corporation and owns and operated a railway line and railway yards in the City of Tacoma, Pierce County, Washington, but denied each and every other allegation therein contained.

III.

For answer to Paragraph III, defendant admits that on or about the 12th. day of September, 1908, it owned and held on its switches in its yards at Tacoma, in the vicinity of Eleventh Street, cars that had recently been unloaded of wheat, and that some

times there was a small amount of loose wheat lying on the floors of said cars, but denies each and every other material allegation therein contained.

IV.

For answer to Paragraph IV, defendant denies each and every material allegation therein contained.

V.

For answer to Paragraph V, defendant denies each and every material allegation therein contained.

VI.

For answer to Paragraph VI, of said complaint, defendant denies each and every material allegation therein contained, save and except that the said Tony Curtz was injured by a car passing over his leg and that as a result of said injury the leg was amputated. And denies that any employe of defendant had authority to invite, encourage or permit the said Tony Curtz to enter a car for the purpose of sweeping or removing wheat therefrom.

Defendant for a further and affirmative defense to said cause of action, alleges as follows:

I.

That on or about the 12th. day of September, 1908, the said Tony Curtz was unlawfully and wrongfully upon the private premises of this defendant in its switching yards in the City of Tacoma, Washington, at a place where there were a number of railway tracks on which cars were frequently moved by means of switch engines constantly in operation in said yard, and at the time he was injured was a trespasser upon the tracks and private premises of this defendant

without the knowledge or consent of the defendant, and any injury which he received was caused by the negligence and carelessness of the said Tony Curtz in unlawfully and wrongfully going upon the tracks and premises of this defendant and trespassing thereon and failing to exercise ordinary care and caution for his own safety and protection.

WHEREFORE, defendant prays that plaintiff take nothing by reason of her said action and that defendant recover its costs and disbursements herein expended.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

(Verification by J. W. QUICK.)

(Acceptance of service.)

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
NOV 17 1910
A. REEVES AYRES, Clerk.
By SAM’L D. BRIDGES, Deputy.”

Reply

Comes now the above named plaintiff and for reply to the affirmative matter in the answer of the defendant, alleges, avers and states:

I.

For reply to Paragraph I of defendant's affirmative defense, plaintiff denies each and every material allegation therein contained.

WHEREFORE, plaintiff prays for judgment according to the prayer of the complaint.

HEBER McHUGH,
JOHN T. CASEY,
Attorneys for Plaintiff.

(Acceptance of service.)

(Verification by Heber McHugh.)

(Endorsed):

“FILED

U. S. CIRCUIT COURT

Western District of Washington

NOV 19 1910

A. REEVES AYRES, Clerk.

By SAM'L D. BRIDGES, Deputy.”

Motion for Judgment notwithstanding the Verdict

Comes now the defendant, the Northern Pacific Railway Company, and moves the Court for judgment notwithstanding the verdict in the above entitled cause for the following reasons, to-wit:

I.

That under all the evidence introduced on the trial

of said cause the defendant is entitled to a judgment in its favor for the reason that the said evidence fails to prove negligence as alleged in the complaint on the part of the defendant and fails to prove facts sufficient to entitle the plaintiff to a judgment on the verdict of the jury.

Motion for a New Trial

In the event the Court denies the foregoing motion, the defendant thereupon moves the Court for a new trial for the following reasons, to-wit:

I.

That the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

II.

Error of the Court committed on the trial of said cause and excepted to by the defendant.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant.

(Acceptance of service.)

(Endorsed) :

“FILED

U. S. CIRCUIT COURT

Western District of Washington

SEP 26 1911

SAM'L D. BRIDGES, Clerk.”

Order

Now on this 29th. day of September, A. D. 1911, this cause coming on to be heard on the motion of the defendant for a judgment notwithstanding the verdict, and further to be heard on the motion of defendant for a new trial, and the Court having heard the arguments of counsel, and being fully advised in the premises,

DOTH NOW ORDER that said motion of defendant for judgment notwithstanding the verdict and said motion of defendant for new trial herein be, and the same are hereby overruled, to which ruling of the Court defendant by its counsel duly excepted.

IT IS FURTHER ORDERED that the time for filing and serving the bill of exceptions in the above entitled cause be, and it is hereby extended to and including December, 1st. 1911.

BY THE COURT.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT,
Western District of Washington
SEP 29 1911
SAM’L D. BRIDGES, Clerk.”

Verdict

We, the jury empanelled in the above entitled case, find for the plaintiff, and assess his damages at the sum of FOUR THOUSAND Dollars (\$4,000.00).

C. W. NEAL, Foreman.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
SEP 23 1911
SAM’L D. BRIDGES, Clerk.”

Judgment

The above action having come on regularly for trial on the 22 day of September, 1911, the plaintiff appearing in person, and by his attorneys, Heber McHugh, John T. Casey, and Bates, Peer & Peterson, and the defendant appearing by its attorney, J. W. Quick; the jury having been duly empanelled and sworn, and evidence having been introduced on behalf of the plaintiff and the defendant, and both sides having rested and submitted their respective cases to the jury, and arguments having been presented and made to the jury on behalf of both parties; the jury having been instructed by the Court and having retired to deliberate upon its verdict, and the jury having returned into Court and declared its verdict in favor of the plaintiff and against the defendant in the sum of \$4,000.00;

Now, Therefore, it is ORDERED, ADJUDGED AND DECREED, that the plaintiff *Tony Cortz*, do have and recover of and from the defendant, the Northern Pacific Railway Company, a corporation, the sum of Four Thousand Dollars, besides his costs and disbursements herein to be taxed, and the

said judgment bear interest at the legal rate.

Dated and done in open Court this 29 day of Sept.,
A. D. 1911.

FRANK H. RUDKIN.

Judge.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT

Western District of Washington

SEP 29 1911

SAM'L D. BRIDGES, Clerk.”

Bill of Exceptions

The above cause coming on for trial in the above entitled Court on September 22, 1911, before the Honorable Frank H. Rudkin, presiding judge thereof, and a jury duly empanelled, the plaintiff appearing in person and by John T. Casey, Esq., Heber McHugh, Esq., and C. O. Bates, Esq., his attorneys, and the defendant appearing by J. W. Quick, Esq., its attorney, the following proceedings were had, to-wit:

The opening statement of the case to the jury was made by Mr. Casey and thereupon the following evidence was introduced.

Mr. BATES: It is admitted by counsel that Mrs. Curtz, mother of Tony Curtz, has been appointed guardian ad litem of Tony Curtz for the purposes of this action.

Mrs. CURTZ, being called and sworn as a witness on behalf of the plaintiff, testifies as follows:

(Testimony of Mrs. Curtz)

DIRECT EXAMINATION.

(By Mr. BATES):

I am the mother of Tony Curtz. Tony is fourteen years old now and was eleven years old at the time he was injured. At the time he was injured we were living on Yakima Avenue in Tacoma, and on that day I was engaged in nursing a sick lady who lived across the street from where we lived. I left home about eight o'clock in the morning of September 12, 1908, and at that time Tony was in the yard trying to cut wood and kindling which he was carrying up stairs where we lived, as we lived on the second floor of the house. His two small brothers and Maggie Slabb, his cousin, were with him. The next time I saw him he was in the hospital and that was between ten and eleven o'clock A. M. I went to the hospital and when I got there his leg had been amputated and he was on a bed without any pillow so that his head was down low and his legs were elevated. He was cold as ice and I thought he was dead. He was there three days before he knew me. He remained in the hospital just four weeks and he suffered a great deal. After he got out of the hospital it was about a year before he got around much; it was about a year before he was able to go to school. He used two crutches for about a year or more, maybe two years, but now he only uses one crutch.

TONY CURTZ, the plaintiff, being sworn, testifies as follows:

(Testimony of Tony Curtz)

I am fourteen years old. I was eleven years old when I was hurt. The morning I got hurt I was at home chopping kindling and my mother left to go to her work. While I was chopping some wood and carrying it up to the house, and when I got through my cousins asked me if I wanted to go down after wheat with them. I did not want to refuse so I went down with them. We went down the steps at the 11th Street bridge and we went up the dock a ways and then came back and met a man there. He had on a blue jacket and overalls and he says: "Good morning." He had hold of a piece of iron which had kind of a round iron on the top and he was turning that around. I did not know what it was at the time, but I have since learned it was a switch. He said "good morning" to us and we said "good morning," and he asked what we came for and we told him we came for wheat, and he says to us "there is lots of it over there in them cars" and he pointed his finger and said "you better hurry over before the other boys and girls get it."

Mr. QUICK: We object to that as incompetent and move to strike the answer of the witness and the statement of the witness as to his conversation with this man as being incompetent.

The COURT: I do not think the permission of

(Testimony of Tony Curtz.)

this man would be any excuse unless it is shown he had authority. I will permit this testimony for the purpose of showing he had knowledge that the boy was there, but any statement he may have made the jury will disregard.

Mr. QUICK: We except to the ruling of the Court that this evidence may be received for the purpose of showing knowledge.

So we went over and put our wagon in front of the door of the cars and we went right in. We thought there was no danger because the man told us to go over there and get it before the others got it, and we went over and got into the cars and started in shoveling the loose wheat and an engine came and gave it a big crash and bumped right in and knocked me out of the car in the yard and I did not know anything afterwards at all. When I went down there I saw lots of children around there. Some were on the tracks and some were on the side of the hill playing. I saw quite a few of them getting wheat. I do not remember how many there were. This was on Saturday. I did not see any engine moving or switching back and forth around there. We had a little red wagon and a cart. My cousins, Maggie Slabb and Phil Slabb, were with me. The door of the car was in the side of the car and we left the wagon and cart at the side of the car about two feet from it. The cars were this side, that is south of the 11th Street bridge, and about as far as across the street.

(Testimony of Tony Curtz.)

My cousin Maggie was eleven years old and Phil was younger than she. I had never been down there before and had never been at or around the railroad tracks or the depot where the trains were going back and forth. I was going to school at the time. I know that the engine gave the car a big jerk and knocked me right out and I did not know anything at all after that until I found myself in the hospital and my leg had been taken off. I stayed in the hospital about a month and I suffered a great deal of pain. My back and leg hurt me the worst; my back hurts me yet. I used two crutches about a year and a half or two years and now I use one crutch. My leg was cut off up close to the hip.

CROSS-EXAMINATION.

(By Mr. QUICK) :

I know what the railroad yards are and the place where we went down was into the yards. There were not very many cars down there. We walked up the dock a little ways. We did not see anything up there and we started back. The car I went into was the end car of the string of cars standing there. I do not remember which side of the car I went in at. The cars were standing so that one side of them was next to the water and the other side was towards the hill and I think we went in on the water side I think we had been there about fifteen or twenty minutes. I do not know what became of the man I was talking to. I did not see any engine at all and had not seen

(Testimony of Tony Curtz.)

any cars moving about there. I do not know what he was turning the switch for, but I am sure he was turning the switch and that he had on blue overalls. The girl and boy who were with me did not get into the same car I did. They got into some other cars on the same track. We took brooms with us and I had a broom that the handle had been broken off so that the handle was about a foot and a half long and I was using this to sweep up the loose wheat in the car. I got this broom out of the barn where we lived. My cousins told me to take it along as Gus Slabb had been down there before. I had not seen any engine or heard one. I was going to take this wheat home to feed the chickens. The Slabbs lived on the first floor and we lived on the second floor out on Yakima Avenue.

MAGGIE SLABB, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Maggie Slabb)

DIRECT EXAMINATION.

I am a cousin of Tony and we were living in the same house where Tony lived, only we lived on the first floor and they lived up stairs. The children out there had told us about getting wheat and so I started down with my brother and told Tony if he wanted to he could come along with us. I took my little red wagon and Tony took his dump cart and we went down the stairway at the 11th Street bridge and there was a man there on the tracks under the bridge

(Testimony of Maggie Slabb.)

turning something and says: "Hello boys and girls," and we says: "Hello" and he says: "what are you after" and we says: "We are after wheat," and he pointed his hand and shows us some cars on the track there and said there was lots of wheat we could get there because other people were getting some there too. So we went down to the cars and I got in the car. I do not know what car Tony got in and I started sweeping in the car and we were there just a little while when a big jam came and I stopped and jumped out and looked for Tony. I had my brother standing there and we were looking for Tony and we found him under the train run over. He left his wagon right in front of the car door and I left mine in front of the door of the car about two or three feet away from the door. I think it was on the water side. I did not know what the man was turning then, but I know now. It was a switch. When we went down the steps onto the tracks, we then went south, about the distance of across the street, from the bridge to the cars. I saw some other children there; about a dozen or more. Some were on the bank and some below playing around. I don't remember seeing any other man except this one. I never saw any engine and did not see any cars moving. My older brother had been down there and got wheat. He is dead now. They come with an ambulance and took Tony away.

Mr. QUICK: I move the Court to withdraw from

(Testimony of Maggie Slabb.)

the jury the evidence of this witness and the witness Tony Curtz as to what other children told them about getting wheat down there, as incompetent, irrelevant and prejudicial.

Mr. BATES: That is put in if the Court please to show how they come to go down there.

Mr. QUICK: The fact that other children said they got wheat down there I think is very prejudicial.

The COURT: (To jury) The fact that other children said they had been down there is not evidence they were there, and you should not consider this statement from outside of the Court. You will consider only the testimony given here in open Court and what is hearsay you will utterly disregard.

CROSS-EXAMINATION.

(By Mr. QUICK):

Tony had been going to school but I think school was over just then. He was backward in his studies for a boy of his age. I had never been down in the yards before and when we went down the steps at 11th Street bridge I saw a few railroad tracks; I don't know how many. I saw cars standing on the track south of the bridge but I do not know how many there were. We went down to where the cars were and I got up in a car but I do not know whether my brother got into one or not and I did not see what car Tony got into. I do not remember how I got into the car, but I climbed up into the car some way, but there was no ladder there. The man I saw was under

(Testimony of Maggie Slabb.)

the 11th Street bridge. I don't think there was any other man around there and I did not see any engine and did not see any cars moving, and I never saw this man after we saw him that once. We were getting the wheat for ourselves and I do not know who the wheat belonged to.

REDIRECT EXAMINATION.

(By Mr. BATES) :

There was not very much wheat in the car. We had just swept it up when the train bumped. I had a little dust pan full, that is all.

The COURT: Wheat left over after unloading, I presume?

Mr. QUICK: Yes, sir.

The COURT: I do not think there is no dispute about that.

Tony was backward in his studies. He was in the third and I was in the fourth grade. I think we had lived in Tacoma three or four years, and Tony I think was able to go to school every day. He was never real healthy I think. He was always complaining of something; headache or stiff neck.

RE-CROSS-EXAMINATION.

I guess he started to grow the last one or two years, and he sells newspapers all the time; I guess for two years or more.

MARK MALONEY, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Mark Maloney)

I live at 611 South 27th Street and am eighteen years old. I know Tony Curtz and had seen him around before he got hurt. I was down in the yard the day Tony got hurt, and I had been in the habit of going down there.

Q. For how long?

Mr. QUICK: We object to that as immaterial.

The COURT: Objection overruled and exception allowed.

A. Probably six months or a year. The cars that had been unloaded would have some wheat left in them and I would go down to get the wheat probably once a week.

Q. During those six months or such a matter before the time Tony got hurt had you seen other children, men and women down there getting wheat?

Mr. QUICK: We object to that as immaterial and incompetent.

The COURT: Objection overruled and exception allowed.

A. Yes, I have seen them down there. Seen no women though. Seen boys and girls and men, but I do not know just how many, but there would be quite a few of them.

The tracks there run between the bluff on the west and the water on the east, and there are docks on the east side of the tracks from 15th Street north

(Testimony of Mark Maloney.)

for a long distance. There is a bridge over the tracks at 11th Street. The docks where they unload wheat are north of 11th Street and on the east side of Dock Street. There was one track at 11th Street in Dock Street and then there were several tracks west of Dock Street. I don't know how many; four or five, I think. I have seen the railroad men around there when I was getting wheat and they have seen me getting it. I saw Tony and a boy and a girl with him over under the 11th Street bridge. There is a switch there under the bridge. They went up towards the cars, the string of cars on Dock Street, I did not notice how many cars there were, probably four or five; maybe more. These cars were on the track that runs across Dock Street there at the bridge. I did not see them any more until Tony was pulled out from under the wheels. I had gone into a car and I got a fearful bump that knocked me against the side of the car and I jumped out, and I heard the little girl holloing and I got around on the other side of the car to flag the switchman that was up ahead and tell him somebody was hurt and he stopped the train.

Q. When you were down there getting wheat before and you saw these railroad men there did you have anything to say to them about getting wheat?

Mr. QUICK: We object to that as incompetent, irrelevant and immaterial.

Mr. BATES: The only object is to show that they knew these boys were there to get wheat.

(Testimony of Mark Maloney.)

The COURT: You may ask him whether they objected or not.

Mr. QUICK: We except to the ruling.

A. No, sometimes they told you to go ahead where there was some wheat. Told you where there was some. Pointed it out to you.

CROSS-EXAMINATION.

(By Mr. QUICK):

These railroad men were the switchmen and workmen working for the railroad. They never ordered me out. I never saw any special man patrolling the tracks to keep the boys away, and I was never ordered away from there by any of Guthrie-Balfour Company's men. I had come down the tracks at 9th Street and got under the 11th Street bridge at the time Tony and these children did, and a man told us we could get the wheat over at those cars. I guess the man was a switchman, as far as I know. There was no engine around there and no cars being moved, but there was an engine up about 15th Street. I got into one of the cars from the water side and I think the others got in from the water side too. I do not know of any engine passing while we were in the cars, and had not noticed any switchmen around there during that time. I did not know the Curtz boy at that time but had seen him around the neighborhood where we lived, as we lived in the same neighborhood; that is about fifteen blocks from where the accident occurred; about a mile or more away.

EDDY MALONEY, witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Eddy Maloney)

DIRECT EXAMINATION.

(By Mr. BATES) :

I am fourteen years old and a brother of the witness Mark Maloney. I did not know Tony at the time he got hurt to speak to him, but we lived in the same neighborhood. I was down in the railroad yards with my brother at the time Tony got hurt. I had never been there before. I saw Tony and his two cousins but I did not see any other children down there. I saw them below the 11th Street bridge. We went down by the loaded cars and there was nothing down there and so we came up by the empty cars south of 11th Street and we went into the car from the bay side and pretty soon Tony came and looked into the car I was in and they went on. When the cars were jammed I jumped out and I saw him under the car dragging along and I turned my face and ran to the end of the cars and met my brother and we went right straight home. I did not know any engine was working there until there was a good bump and knocked me up against the car and I grabbed my shovel and sack and jumped out of the door.

CROSS-EXAMINATION.

(By Mr. QUICK) :

The engine was up at the other end of the cars, down pretty near 15th Street. My brother was in

(Testimony of Eddy Maloney.)

one car and I was in another. I do not know where Maggie and her brother and Tony were. When I jumped out I ran towards 11th Street and across the tracks and met my brother, and we went right straight home.

EDWIN WOLFE, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Edwin Wolfe)

DIRECT EXAMINATION.

(By Mr. BATES):

I am fourteen years old and I lived up in the same neighborhood with Tony Curtz, but did not know him very well. I had been going down in the railroad yards for about a year before Tony was hurt, whenever my mother would let me, which would be four or five times a week sometimes, and other times not more than once a week. I went down there to get wheat.

Mr. QUICK: We object to this line of evidence.

THE COURT: Objection will be overruled. The only purpose of this testimony is to show knowledge on the part of the company, and it is admitted for that purpose. The defendant is allowed an exception.

When I would go down in the yard to get wheat before Tony was hurt, I have seen other children and men down there getting wheat. Sometimes there would be one, two or three and sometimes none. I would see the switchmen down there handling the

(Testimony of Edwin Wolfe.)

cars and they have told me—

Mr. QUICK: I object to that as incompetent.

Mr. BATES: I do not want to get over the rule, but I want to show that these men were there after wheat in the car that is all.

Mr. QUICK: If they did know it, it would not bind the company.

THE COURT: The objection is overruled and exception allowed.

I was down there the day Tony got hurt. I came down by the 11th Street bridge and I saw him there a little south of the bridge. I did not see anybody else but Tony; that is all. The wagons were on the water side from the cars and about four feet from the car. Tony was going to get into the car when I saw him. Then I went north towards 9th Street. When I came back I heard about the accident and I saw the ambulance down by 15th street. There was an engine down by 15th street. I could see the smoke from it. I saw one switchman there under the 11th street bridge.

WILLIE THERKILESON, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of Willie Therkileson)

I live at 2211 "I" Street and work at the post office. I am eighteen years old. I know Tony Curtz, as he lived up in the same neighborhood before he got hurt, for two or three years I guess. I was in the habit of going down into the freight yards to

(Testimony of Willie Therkilesen.)

get wheat. I would go down after school and on Saturday, and I have seen other children and men down there. No body ever ordered me away and the railroad men working there knew I was there getting the wheat. I did not see Tony the day he got hurt. The cars would be all along the wharf there, some of them standing right up against the docks as far north as the London Dock, and some cars would be on the side tracks too. One of the tracks crossed Dock street there at the 11th Street bridge, and Dock street runs on the east side of the tracks from 11th Street to 15th Street. The track that crosses Dock Street at 11th Street runs on the east side of Dock street and is up next to the docks.

CROSS-EXAMINATION.

(By Mr. QUICK) :

The yards run all the way from 15th street north to 7th street, a distance of about a mile, and there are a great number of tracks and side tracks and switches, and usually long strings of cars there. Between 11th street bridge and 15th street there are four or five tracks and north of 11th street there are a great many tracks. I never was ordered out of the yards by the switchmen. The switchmen when they are around there are pretty busy handling cars and they never got after us.

(Testimony of Willie Therkileson.)

REDIRECT EXAMINATION.

(By Mr. BATES) :

The cars we usually got the wheat out of were most of them along right up next the docks between 11th street and 7th street.

J. P. FARLEY, a witness called on behalf of the plaintiff, testifies as follows:

(Testimony of J. P. Farley)

DIRECT EXAMINATION.

(By Mr. BATES) :

I reside in the city of Tacoma and am a teamster for the Tacoma Truck Company and I am familiar with the conditions along Dock Street. In going to the docks we usually drive down 21st street or 15th street to as far north as 9th street. We drive from 21st street to 15th street on the brick pavement and from 15th street follow Dock street straight north. The Municipal Dock is the first one north of 11th Street and then the Alaska Pacific Dock, then the London Dock, then the Balfour-Guthrie Grain Warehouses and then the Eureka Dock. Between 11th street and 15th street there are six tracks. The one on the east side crosses Dock Street at the 11th Street bridge then runs on the east side of Dock Street close up to the warehouses. The water front is east of Dock Street. I would be down there some three or four times a day with my team and I have seen men and children getting wheat out of the cars quite frequently.

(Testimony of J. P. Farley.)

CROSS-EXAMINATION.

(By Mr. QUICK) :

The yards are on the west side of Dock street and they run from Prescott clear to the Smelter, a distance of six or seven miles, but the most tracks are between 11th and 7th streets. At the foot of 9th street there are probably 50 or 60 tracks and usually five or six switch engines are working in there and the switchmen are kept quite busy with their work. I never saw them order children away, but they may have done so.

F. L. RAYMOND, a witness called and sworn on behalf of the plaintiff, testifies as follows:

(Testimony of F. L. Raymond)

DIRECT EXAMINATION.

(By Mr. BATES) :

I live in Tacoma and am a teamster for the Tacoma Truck Company and have been for about six years. I am well acquainted with the situation in the freight yards between 9th and 15th streets in Tacoma. Dock street runs between 9th street and 15th street and one of the railroad tracks crosses Dock street just south of the 11th street bridge and then runs north on the east side of Dock street and close to the grain warehouses. The tracks between 11th street and 15th street are west of Dock street, between Dock street and the bluff, and this one track switches off about 100 yards south of the bridge and it angles across Dock street. Before September, 1908, I was

(Testimony of F. L. Raymond.)

along there from one to five times a day and I had seen children, boys and girls, along between 9th street and the bridge getting wheat out of the cars quite frequently. The railroad men would be around there switching in the yards at the time but I never heard them order any one away.

CROSS-EXAMINATION.

(By Mr. QUICK) :

Q. You do not know but what they had been?

A. I could not say whether they had or had not been. I never heard the switchmen give them any orders.

Q. Were you there the day Tony Curtz got hurt?

A. Yes.

Q. Where were you at that time?

A. At the time I should judge I was about even where the switch leads off from the track on the west side of the Dock street. I was about even with that switch, going south, with a load of sugar.

Q. And where was the engine?

A. The engine was about 15th street as near as I could say. I could not see it from where I was because I was around the curve from the engine.

Q. Was there a string of cars reaching from near 11th street south to about 15th street?

A. There was a string of cars. I was pretty near up to the end of the cars when the engine hitched on to them, and that was I should judge,—about 75 feet south of the 11th street bridge.

Q. And the other end of the string was down, it

(Testimony of F. L. Raymond.)

was somewhere.

A. It was somewhere in the neighborhood of the Pacific Fruit, along in there, about 15th street. It was over in the yards.

Q. That would be the distance of about six or seven hundred feet wouldn't it?

A. I think it is in the neighborhood of five or six hundred feet.

Q. How long had you been there at the time this accident occurred?

A. How long had I been down at the dock?

Q. Yes?

A. I had been there, I could not say. I think it was my second trip that morning. I make three trips in the forenoon, and that was my second trip. I do not remember how long I had to wait before I got my load. There was a couple of teams ahead of me. We have to take our turn. I do not know just exactly how long that was.

Q. Had you seen Tony Curtz before he got hurt?

A. No, sir, I did not see him while I was loading there. The first I seen of him was when the train hooked on.

Q. Where were you loading?

A. I was back in under the 11th street bridge. There are two places we can back in and I was in the middle place on the left hand side facing south, the middle place I got my load of sugar.

Q. Had you seen any children around there?

(Testimony of F. L. Raymond.)

A. I had not seen any children around there at that time.

Q. Did you notice any switchman around there?

A. I did not notice any switchman, no, sir.

Q. You say you were under the 11th street bridge?

A. Yes, sir, I was under.

Q. How long did it take you to load?

A. It is according to how many trucks you have. I have loaded in eight minutes and then it takes half an hour to load.

Q. You do not know how long it took you that day?

A. No, sir, I do not know how long it took me that day.

Q. Did you notice any switchman there under the 11th street bridge?

A. No, sir, I did not.

Q. Had there been any switching of cars there while you were there?

A. Not while I was there, not as I remember.

Q. What called your attention to the boy?

A. When I first seen the boy, I seen him when the cars hit. When I first seen him, as near as I can remember now, he was beside the train, but when the engine hit he got down on his hands and knees and crossed the rail right in front of the rear trucks, on the east side of the car, and picked up either a broom or a shovel, a short-handled broom or shovel, just as the train started, and when the

(Testimony of F. L. Raymond.)

train started I am pretty sure the wheels did not run over the boy because there was no blood there. As near as I can figure out there is one of the bolts that comes through the bolster that caught in his clothes and jerked him along and rubbed him on the ties and broke his leg and mangled it all up. One of the main bones was sticking out through his thigh. They dragged him in the neighborhood of 100 feet before he dropped out. When I saw him I started to get my team to start up, to get them to stop the engine as quick as I could. The switchman was on the other side of the train so that I could not signal the engineer. They were backing in, the engine was.

Q. The switchman was on the opposite side of the train?

A. The switchman was on the opposite side of the train from where the boy was.

Q. Then he could not see him?

A. He could not see him. I saw that I could not make any headway by trotting my team. I stopped the team and I jumped off. I hollered at the two boys that were loading poles for Harrison Brothers, to see if they could signal and stop the train, as there was a boy run over by the train and they were dragging him. They run out, I think the little fellow he run out and he hollered. There was so much hollering going on. The boy was laying there on the ground.

Q. The switchmen at the time were down at the

(Testimony of F. L. Raymond.)

south end of the train?

A. I think the nearest that there was any switchmen to him, I do not believe there was a switchman on this side of the train. I believe the nearest was at least two hundred feet.

Q. The engine had come in from the south end?

A. The engine had come in from the south end and hooked on to the train of cars and started out a little.

Q. And as you saw it the boy was on the ground at the time the coupling was made?

A. When I first seen the boy as near as I can remember now he was on the ground.

REDIRECT EXAMINATION.

(By Mr. BATES) :

Q. When you are loading sugar there you are pretty busy doing that aren't you?

A. You bet you.

Q. You are not looking around to see if there are any switchmen there?

A. Yes we are busy; we have to watch the truckers.

(By A JUROR) :

Q. You saw the train when it hooked on to the car when it made the coupling?

A. I saw the car at this end move.

Q. You saw it when it made the coupling?

A. Yes.

Q. And you saw the boy at the same time on the ground?

A. Yes, sir.

(Testimony of F. L. Raymond.)

Q. You did? A. Yes.

Q. Then he could not have been in the car when the coupling was made?

A. I do not think he could.

Q. He was stooping over?

A. After they had coupled the cars, as near as I can figure it, after they had coupled on to the cars he went to get his broom, not thinking about the cars starting up, went to get his broom for fear he would lose it, as near as I can see, and he crawled over and reached in front of the rear trucks, and just as the car started he threw himself around with his broom or shovel or whatever it was in his hand, and the bolt that is below the bolster caught in his clothing and dragged him and crushed the leg all along there. The switch crew and myself examined the track and I could see no blood on the rails or on the car where the wheel had run over him.

Q. That was just an ordinary coupling was it?

A. That was just an ordinary coupling that they make every day.

(By Mr. QUICK):

Q. So that the jury can get it a little plainer, the engine came in from the south end of the string and struck the cars and made the coupling?

A. Yes, sir.

Q. And then the cars stopped after the coupling was made?

A. They stopped for an instant, yes, sir.

Q. And the boy reached in in front of the rear

(Testimony of F. L. Raymond.)

trucks? A. Yes, sir.

Q. And the train then started south?

A. Started south for the grade.

(By A JUROR):

Q. Do you know where the broom was?

A. The broom was between the rails, right in under, right pretty near in under the wheels, it was. I should judge the way it looked, after the coupling had shoved the cars back the broom was right inside the rail, about the way I should judge, just about that far (indicating), that far in front of the wheel. From where I was it looked that way. The cars were at least 100 feet from me, the car he was under. There were about three cars at least, two or three cars behind the car that caught him.

Q. Did you see him before the train made the connection or coupling?

A. I did not,—I seen him, yes.

Q. I mean you saw them?

A. I did not take any notice to them. I seen the little wagon as I pulled out. I looked down that way as men generally do. A man gets a chance to look around a little bit down there.

Q. You do not know then whether he fell out from the door?

A. I could not say, no, sir.

(By ANOTHER JUROR):

Q. But you saw him on the ground reaching for this broom when the coupling was made, didn't you?

A. He reached for the broom after the engine

(Testimony of F. L. Raymond.)

had coupled on to it.

Q. The broom was underneath the car?

A. Yes the broom was underneath the car.

Q. Then it would have been impossible for him to have been thrown out of the car and reached under there after the broom, after he had been thrown out?

A. The way it looks like to me, yes, sir.

DIRECT EXAMINATION.

(By Mr. BATES) :

Q. But you do not know as a matter of fact about that at all.

A. I do not know the boy was in the car before at all.

Q. When you came out from the dock and turned south with your sugar you saw two carts there?

A. No, sir, I did not notice the two carts. I only noticed one little two-wheeled cart.

Q. You saw only one little two wheeled cart?

A. Yes.

Q. That was outside the car?

A. Outside the track, yes, sir.

Q. And there wasn't any children in sight?

A. I did not see the children.

Q. You did not see the children?

A. I did not take any notice to them. If there were children I did not take any notice to them. The first thing I seen—

Q. You saw the cart there, but you saw no children?

(Testimony of F. L. Raymond.)

A. I seen the cart after the boy was caught, when I went up there. That was where the cart was. I did not see the cart when I first pulled out.

Q. You did not see anybody when you first pulled out?

A. I never noticed the whole business until after the car struck him. Then I noticed the cart?

Q. You were driving south and so you do not know as a matter of fact whether the boy was in the car and was knocked out, or not? A. No.

RE-CROSS-EXAMINATION.

(By Mr. QUICK) :

I was on the east side of the track next to the water and the track bends to the west. Here is the main line coming down west of Dock street between the street and the bluff, and this track that the cars were on comes up from 15th street on the west side of Dock street to a switch south of the bridge, and then it angles across Dock street to the west side of the street under the bridge and then runs along north by the warehouses.

The switching crew was on the west side of the track in the curve on the opposite side of the cars from where I was.

(A JUROR) :

Q. How far were you from the car when you first saw him?

A. When I first saw him I was about 100 feet.

Q. Good clear view? A. Yes, sir.

MRS. CURTZ, being recalled, testifies as follows:

(Testimony of Mrs. Curtz)

DIRECT EXAMINATION.

(By Mr. BATES) :

Tony's health was very poor from the time he was born until after he was injured. He only weighed three pounds when he was born, and he was eight months old before he could hold up his head. He was always backward in his studies, being about two grades behind other boys of his age. He was not as large as his cousin Maggie who was of the same age. About two years ago he began to grow and has been much healthier since then.

Mr. QUICK: He is a big husky boy now all right?

A. Yes.

Mrs. SLABB, being called and sworn as a witness on behalf of plaintiff, testifies as follows:

(Testimony of Mrs. Slabb)

I am the aunt of Tony and have known him all his life. He was a little tiny baby, weighed three pounds when he was born and he never felt well, always had something the matter with him. Maggie was lots bigger than he was. He started to grow about two years ago and I think he will be a man all right now.

Mr. BATES: It is stipulated that Dock Street at that time was a regularly laid out and travelled street of the city of Tacoma.

Plaintiff rests.

Defendant's Motion

Mr. QUICK: Defendant moves the Court to withdraw this case from the jury and grant a non-suit for the reason that the evidence is not sufficient to make a case for submission to the jury.

The COURT: If this case rested on the authority of a switchman to grant permission to go into this car and take this wheat or if it rested on actual knowledge on the part of the train men that he was present, I would have no hesitation in granting the motion, for there is no proof here that any person in authority had notice of the presence of these boys, or is there any proof that the switchman had any authority to give them permission to go there. In fact, I struck out the testimony that he gave permission.

The only theory upon which the case can go to the jury is that of imputed notice arising from the testimony as to the custom which prevailed. Without commenting in any way upon the testimony I will for the present deny the motion.

Mr. QUICK: We except to the ruling of the Court.

The COURT: Exception allowed.

THEREUPON, to sustain the issues upon its part, the following witnesses were called in behalf of the defendant.

A. A. DIKEMAN, being called and sworn as a witness for the defendant, testifies as follows:

(Testimony of A. A. Dikeman)

DIRECT EXAMINATION.

(By Mr. QUICK) :

For about six years I have been foreman of the Balfour-Guthrie warehouses along the water front. Our warehouses are 1150 feet long and we store and handle wheat which is shipped from here.

Q. What effort do you make to keep boys away from the cars?

Mr. BATES: I object to that as immaterial. He is not an employe of the railroad company.

The COURT: I will overrule the objection.

Mr. BATES: Give us an exception.

A. I have repeatedly ordered boys away from our premises and away from cars that were unloaded and I have given orders to our men who were working there that when boys came to order them away and not allow them there at all. I have done this ever since I have been foreman.

CROSS-EXAMINATION.

(By Mr. BATES) :

Our warehouses are north of what is known as the Municipal Dock at 11th Street. The south end of our warehouses begin about 1100 feet north of 11th Street and in handling grain, which we receive in cars, we have ordered boys away from the cars.

Mr. WILLIAM CUMMING, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of William Cumming)

I am Special Agent for the Northern Pacific Railway Company and have been for nine years.

(Testimony of William Cumming.)

Q. What effort Mr. Cumming is made to keep boys out of the yards and away from the grain tracks during the season that grain is being moved?

A. I put a special watchman on during this season of the year when wheat is coming in in addition to the regular watchman, and at the time this boy was hurt I had a man by the name of F. L. Wiley especially employed and instructed to keep small boys out of the yards and from jumping on moving trains, etc., and he experienced quite a lot of difficulty. He made daily reports to me.

Mr. BATES: We object to that.

The COURT: Do not tell anything that came to you from others. Mr. Wiley was on during the grain season of 1907 and 1908. During that time we had two watchmen in the Moon Yard and one at the head of the bay.

Q. And what were your instructions to them in regard to children found in the yard?

A. To arrest them if they found them taking wheat from whole sacks or knifing the sacks. Sometimes they would knife the sacks and let the wheat run out and come back and claim that they found it on the ground, and so forth. I especially instructed them to keep these boys out for fear of any accident.

CROSS-EXAMINATION.

(By Mr. BATES):

As special agent I have charge of the Tacoma division, which extends from Auburn south to Port-

(Testimony of William Cumming.)

land and east to Ellensburg. I have assistants under me. I was anxious to see that the sacks were not cut and the wheat stolen and was attempting to guard against that during the wheat season.

EDWARD C. TROW, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of Edward C. Trow)

I am working now as gate-man at the Union Station here. In September 1908 I was a switchman and was foreman of the switching crew that coupled onto the cars at the time the plaintiff was hurt. Switchmen Housman and Hughes were working with me at the time. There was a string of empty cars standing on the grain lead track and extended from about a couple of 100 feet south of 11th Street to near 15th Street. There were about 18 cars in the string. We came in onto the track for the purpose of moving these cars from the switch at 15th Street and coupled onto the south end of the string. The track these cars were standing on is on a curve, the inside of the curve being the west side of the track which is the side away from the water. It is the duty and custom of switchmen to work on the inside of the curve so that they can see the cars the full length of the string in order to know that they are all coupled together and move when the engine starts to pull out. We could not see along the opposite side of the string of cars as our view would be shut off by the body of the cars. Nor could we have seen had we been on the other side

(Testimony of Edward C. Trow.)

on account of the curve without going across Dock Street toward the water. I had not seen any children about the cars before that time and did not know that any were there. We came in with the engine from the south and coupled onto the cars and then started to pull out toward the south and I started to walk back north along the cars when I saw a young fellow running towards me waiving his arms and I imagined there was something wrong and I gave a stop signal to the engineer and the cars were stopped. I do not think we moved over a car length after I gave the signal and not over five or six car lengths all together. I went on back and found that a boy had been hurt. This was the first I knew of any children about the yard or cars. I have been a switchman for fifteen years and am familiar with the authority of a switchman and his duties.

Q. Has the switchman any authority to permit children to enter box cars?

A. No, sir.

Mr. BATES: I understand your honor has ruled as a matter of law that they have not any authority.

The COURT: I have ruled as a matter of law that there is no testimony in the case up to the present that a switchman has any such authority, and if there is no further testimony on that question I will so instruct the jury.

Mr. QUICK: If they will state that they do not intend to introduce any evidence:—

(Testimony of Edward C. Trow.)

Mr. BATES: We do not intend to introduce any evidence along that line.

The COURT: In the present state of the testimony I will charge the jury as a matter of law that a switchman has no authority to authorize a person to go in a car for any purpose whatever.

Mr. QUICK: Then it will not be necessary to offer any evidence on that question.

CROSS-EXAMINATION.

(By Mr. BATES) :

I had been working as a switchman down there in the yards for about nine years and my duty as a switchman took me the whole length of the yards from 15th Street to the Flyer Dock, and also over the tracks at the head of the bay and out to South Tacoma. There were none of my crew on the water side of the train on account of the curve and if they had been they could not have seen the rear cars without going across Dock Street over to the bay side. This track does not run in Dock Street but parallels the street and then crosses it on an angle up at the 11th Street bridge. I do not think you could see the north end of the cars by going out to the middle of Dock Street.

RE-CROSS-EXAMINATION.

(By Mr. QUICK) :

Q. Was it the custom of train men in handling cars on the curve to stay on the inside of the curve?

A. It is. It is customary in switching in the yard for you to get on the side where you can see the

(Testimony of Edward C. Trow.)

rear car. It is not customary to walk back because there is not supposed to be anybody underneath or around the cars unless there is a blue flag placed there by the car men. That signifies there is a man about the car or underneath, but in the yards it is customary to go and couple on at any time during the day or night, and start the movement of the cars without going back. The only occasion or reason a person would go back was simply because the cars were not coupled together. If you can see the rear end coming, that is sufficient. But if it is dark and a man cannot see them, a man goes back to be sure he gets all the cars.

FRANK HOUSMAN, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of Frank Housman)

DIRECT EXAMINATION.

(By Mr. QUICK) :

I have been a switchman for the defendant for about twelve years and was a member of the crew under Mr. Trow at the time the plaintiff was hurt. I was working with the engine. The cars were standing on a switch track which connects with the main track close to 15th Street and the south end of the cars were just in the clear at 15th Street. We came in with the engine from 15th Street switch and I coupled onto the cars. We then started to pull out and moved about five or six car lengths going south I saw foreman Trow give signal to stop. The engine

(Testimony of Frank Housman.)

stopped with the engine and car over 15th Street and as I knew there must be something wrong, as I saw Trow going back, I cut the train so as not to block 15th Street crossing, as it is a very busy crossing, and then went back to the rear where I saw the boy with his leg off. I did not know anything about any children being on or about the cars prior to that time. I had been working in this yard about four years.

W. J. HUGHES, being called and sworn on behalf of the defendant, testifies as follows:

(Testimony of W. J. Hughes)

DIRECT EXAMINATION.

(By Mr. QUICK):

I am a switchman for the defendant company and was working under Mr. Trow at the time plaintiff was injured. I came in with the engine when we coupled onto the south end of the string of cars and did not know anything about this boy or any other children being around the cars until I went back after Mr. Trow told me he thought something was the matter at the hind end. I had been working as a switchman down here in the yard for about eight years.

J. W. CLARK, a witness called and sworn on behalf of the defendant, testifies as follows:

(Testimony of J. W. Clark)

I am a farmer and live at O'Brien, Washington. In September 1908 I was working in Tacoma for the

(Testimony of J. W. CLARK.)

Telephone Company and at the time this boy was hurt I was loading poles on a wagon on the west side of Dock Street about 150 or 175 feet from where the boy was hurt. These poles were east of the track the cars were on between the track and the street. I saw three children come down about 15 minutes before the accident. At the time of the accident I was standing with my back toward the north and I heard the boy holler and I looked around and saw him being dragged by the car. The train dragged him right up to where I was. I run off to the left toward the water to see if I could see the engine to stop it. The crew were on the other side and I could not see them. I heard them holler on the other side and the train stopped and the lad got out from under the wheels right at the end of the poles where I was. I saw the children in the cars just a few minutes previous to the accident. I had not seen any switchmen around there and did not see any until after the accident. I did not see the boy get hurt and do not know whether he was in the car or not when the engine coupled on.

CROSS-EXAMINATION

(By Mr. BATES) :

I was about half way between 11th Street bridge and 15th Street and on the west side of Dock Street. The string of cars extended past where I was working up to about the bridge. When I saw the children they were not walking close to the cars but were right out in the middle of the road. They had been up towards 15th Street and passed me going towards 11th

(Testimony of J. W. CLARK.)

Street and the next I knew of them was when I heard the boy hollering and saw him being dragged by the car.

EDWARD TROW recalled.

(Testimony of Edward Trow)

DIRECT EXAMINATION.

(By Mr. QUICK) :

Q. What were your instructions if any in regard to children about the yard?

A. Why to keep them off, to keep them away.

Q. From whom did you get those instructions?

A. Why we get our instructions from the yard master, our superior officer.

Q. Do you know whether that was instructions given generally to the switchmen?

A. Given to everyone connected with the railroad and working around the tracks.

Defendant rests.

Mr. BATES: No rebuttal.

Mr. QUICK: Defendant moves the Court to instruct the jury to return a verdict in favor of the defendant for the reason that the evidence is not sufficient to submit the case to the jury.

The Court: The motion is denied.

Mr. QUICK: Exception.

Court's Instructions

THEREAFTER, and after argument before the jury by counsel for the plaintiff and defendant, the Court charged the jury as follows:

GENTLEMEN OF THE JURY:

Without burdening you with the formal allegations of the pleadings in this case, I will state to you in general terms that this case is prosecuted upon the theory that for a considerable time before the 28th day of September 1908 persons in considerable numbers, including children and others, were in the habit of going to the cars in the yards of the Northern Pacific Railway Company in this city for the purpose of sweeping up wheat found in the empty cars and carrying it away; that in pursuance of this custom this plaintiff visited the railroad yards on the 28th day of September 1908, and while there was injured through the negligence and carelessness of the defendant and its employees. The defendant on the other hand denies that the plaintiff was there in pursuance of any custom, and alleges that he was there as a trespasser and that he was guilty of contributory negligence. Upon these issues, gentlemen of the jury, I charge you as follows:

It first devolves upon you to determine whether or not the defendant, Northern Pacific Railway Company, or its servants or agents, while engaged in their work for such company, were negligent in the operation of the train of cars as alleged in the complaint, and whether or not such negligence, if any you find, was the proximate cause of the injury complained of, and in order to properly determine such question it will be necessary for you to first determine the duty, if any, which the defendant company owed to the plaintiff, and such questions depend largely upon the

facts and surrounding circumstances. Negligence consists in doing something or failing to do something which a person of ordinary prudence and care would have done or would not have failed to do, under like and similar circumstances. If you find that at the time of the injuries complained of in the complaint, and for sometime prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant's track and sweeping the wheat up and gathering the wheat from in and about said cars, and if the defendant, its servants and employees knew of such custom or by the exercise of ordinary care and observation could have known of it, then I instruct you that the defendant Railroad Company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

You are instructed that in determining whether or not the defendant, its servants and employees were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employees at and about the point where, and the time when the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for

the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars.

In determining whether or not an act committed by a child of the age of this plaintiff at the time of the injury is, or is not contributory negligence, you will take into consideration the familiarity or unfamiliarity of the child with the situation in which he was just prior to the accident, the natural tendency and inclination of a child of that age, the probability, if any, of a child of that age following other and older children into a place of danger without such caution or care as would ordinarily be used by older and more experienced persons; and you are to judge the actions of this plaintiff at and just prior to the injury, not by the standards of care ordinarily exercised by persons of greater age and experience, but by the standards of care ordinarily and customarily used by boys of the age, knowledge, experience, tendency and inclinations of this plaintiff, at the time of the accident, under similar conditions and circumstances.

You will observe, gentlemen of the jury, this case rests entirely upon custom. These tracks and these yards are the private property of the Northern Pacific Railroad Company. It is under no legal obligation to fence them to keep the public out. It is under no legal obligation to employ men to keep people from trespassing on these yards. It is not the general

guardian of children or any other member of the public. It does, however, have certain duties and if it was aware of the general custom of a number of children to visit this yard and it took no steps to prevent it, then it acquiesced in that custom and was bound to recognize conditions as they found them, and was bound to exercise reasonable care in view of the custom which thus existed. If you find that there was no such custom there, then I charge you as a matter of law that this plaintiff was a trespasser and cannot recover. If you find the defendant company exercised reasonable diligence to keep trespassers away from its ground and its tracks, I charge you as a matter of law that it performed its duty to the public, and there can be no recovery here, because in that event this plaintiff would be a trespasser and the defendant would only be liable to him for willful or intentional injury, and there is no such claim here that any such willful or intentional injury was inflicted.

In determining the question of contributory negligence, gentlemen of the jury, it will be necessary for you to determine from the testimony how this accident happened. Some testimony on the part of the plaintiff tends to show that when the car was struck by the engine the boy was thrown out of the box car and got under the wheels. It is for you to say whether that theory of the case is probable or improbable. Was it likely or probable that a person thrown out of the side of a box car would come under the wheels?

On the other hand, gentlemen of the jury, there is testimony on the part of the plaintiff here tending to show that the boy reached in over the rail in order to get a broom, after the front end of the car had been struck by the engine and pushed backward. If he did that it is for you to say whether such an act on the part of a boy 11 years of age was contributory negligence. A boy even of that age is presumed to know that if a train runs over him it will injure him. I am not expressing any opinion on these facts, gentlemen of the jury; that is for your consideration, and your consideration alone, but before you return a verdict for the plaintiff here you must be satisfied by the preponderance of the testimony that the custom existed, and that custom was acquiesced in by the company, and that the railroad company failed to exercise due and reasonable care in view of that custom; and then the plaintiff cannot recover if he himself is guilty of contributory negligence. These are the only instructions I deem it necessary to give you.

You may retire with the bailiff.

Mr. QUICK: Just a moment. While I think the Court touched upon the subject in the instruction I am inclined to think it was not plainly stated to the jury that if they found from the evidence that the defendant exercised ordinary care in endeavoring to keep children and others out of its yards and away from its cars, then it did not acquiesce in the custom.

The COURT: I have so charged the jury, that if they exercise that degree of care they have exercised

their full duty under the law, and would not be guilty of negligence.

Mr. BATES: In regard to the amount of damages, your Honor.

The COURT: Gentlemen of the jury, one moment. On the question of damages, gentlemen of the jury, I charge you as follows:

If you should find for the plaintiff you may fix his damages at such amount as will compensate him for the injuries he has suffered, for the pain and suffering he has endured, if any, up to the present time, and such pain and suffering, if any, which he will probably endure in the future, by reason of his injuries, and also his loss of earning capacity, if any, and also such anguish and humiliation of mind as he may suffer by reason of his present condition in all, however, not to exceed the same asked for in the complaint.

(Whereupon the jury retired to deliberate of their verdict.)

Exceptions

Mr. BATES: The plaintiff excepts to the refusal of the Court to give instructions Number 4, 5 and 6.

Plaintiff also excepts to that part of the Court's instruction in which he said that there was testimony tending to show that the plaintiff reached in over the rail of the track after the front end of the car had been pushed back.

Mr. QUICK: The defendant excepts to instruction number 2 requested by the plaintiff and given

by the Court to the effect that it was the duty of the the defendant, its servants and employees, to except that children or other persons would be in or about the cars or tracks for the purpose of getting wheat, and that it was the duty of the defendant under such circumstances to exercise ordinary care to prevent accidents to such persons, for the reason that said instruction imposes upon the defendant the duty of exercising ordinary care to prevent accidents to trespassers, and would make the defendant liable for an injury received by the plaintiff where the defendant was without knowledge that plaintiff was upon its cars or in a place of danger.

THEREAFTER, and on the 29th day of September 1911, after argument upon the motion for a new trial and for judgment notwithstanding the verdict, the Court ruled as follows:

The COURT: I think as a matter of fact in this case it was established beyond controversy that it was customary for children to go there for that purpose. There was no dispute in the testimony on that point, and I think also the testimony on the point was sufficient to charge the company with notice of that fact.

(Discussion)

The COURT: I do not know what it is leading to exactly. I do not know where this is going to stop, but during this present term of Court verdicts were returned by the jury aggregating more than twenty thousand dollars for injuries to persons where they had, in my opinion, no conceivable right to be, and I

am satisfied the jury imposes a much higher degree of care upon railroad officials than they themselves would exercise.

I am going to overrule this motion for two reasons. The first reason is I think it will be affirmed; the second reason, the railroad company is far better able to carry it to the higher Court than this one-legged boy.

Mr. QUICK: The Court will give us an exception to the ruling.

The COURT: Exception allowed.

Verdict

THEREAFTER the jury returned into Court their verdict in favor of the plaintiff in the sum of \$4000.00.

Now in the furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause and prays that the same may be settled, allowed, signed and certified by the Judge, as provided by law, and filed as a Bill of Exceptions.

GEO. T. REID,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for Defendant.

Service of the within Bill of Exceptions is hereby admitted this 16th day of November, 1911.

JOHN T. CASEY,

HEBER McHUGH,

CHARLES O. BATES,

Attorneys for Plaintiff.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT,

Western District of Washington

NOV 16 1911

JAMES C. DRAKE, Clerk.

Albert P. Close, Deputy.”

Order Settling Bill of Exceptions

Now on this 5 day of December, 1911, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said cause, defendant appearing by J. W. Quick, its attorney, and the plaintiff appearing by John T. Casey, Herbert C. McHugh and C. O. Bates, his attorneys, and appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiff within the time provided by law, and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that both parties consent to the signing and settling of the same, and that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part

of said Bill of Exceptions and the Clerk of this Court is hereby ordered and instructed to attach the same thereto;

Thereupon, upon motion of J. W. Quick, Esquire, attorney for defendant, it is hereby

ORDERED that said proposed Bill of Exceptions be and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the Clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK H. RUDKIN,
Judge.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT,
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Assignment of Error

Comes now the defendant, the Northern Pacific Railway Company, and files the following Assignments of Error upon which it will rely upon its prosecution of its Writ of Error in the above entitled

matter in the United States Circuit Court of Appeals for the Ninth Circuit for relief from the judgment rendered in said cause.

I.

The Honorable Circuit Court erred in admitting incompetent and immaterial evidence prejudicial to the defendant as follows:

The following evidence of the plaintiff, to-wit: "We went down the steps at the 11th Street bridge and we went up the dock a ways and then came back and met a man there. He had on a blue jacket and overalls and he says: "Good morning." He had hold of a piece of iron which had kind of a round iron on the top and he was turning that around. I did not know what it was at the time, but I have since learned it was a switch. He said "good morning" to us and we said "good morning," and he asked what we came for and we told him we came for wheat, and he says to us "there is lots of it over there in them cars" and he pointed his finger and said "you better hurry over before the other boys and girls get it."

The following evidence of the witness Maggie Slabb, to-wit:

"There was a man there on the tracks under the bridge turning something and says: "Hello boys and girls," and we says: "Hello" and he says: "what are you after" and we says: "We are after wheat," and he pointed his hand and shows us some cars on the track there and said there was lots of wheat we could get there because other people were getting some there too."

The following evidence of the witness Mark Maloney, to-wit:

“Q. When you were down there getting wheat before and you saw these railroad men there did you have anything to say to them about getting wheat?

Mr. QUICK: We object to that as incompetent, irrelevant and immaterial.

Mr. BATES: The only object is to show that they knew these boys were there to get wheat.

The COURT: You may ask him whether they objected or not.

Mr. QUICK: We except to the ruling.

A. No, sometimes they told you to go ahead where there was some wheat. Told you where there was some. Pointed it out to you.”

The following evidence of the witness Edwin Wolfe, to-wit:

“I had been going down in the railroad yards for about a year before Tony was hurt, whenever my mother would let me, which would be four or five times a week sometimes, and other times not more than once a week. I went down there to get wheat.

Mr. QUICK: We object to this line of evidence.

The COURT: Objection will be overruled. The only purpose of this testimony is to show knowledge on the part of the company, and it is admitted for that purpose. The defendant is allowed an exception.

When I would go down in the yard to get wheat before Tony was hurt, I have seen other children and men down there getting wheat. Sometimes there would be one, two or three and sometimes none. I

would see the switchmen down there handling the cars and they have told me—

Mr. QUICK: I object to that as incompetent.

Mr. BATES: I do not want to get over the rule, but I want to show that these men were after wheat in the car that is all.

Mr. QUICK: If they did know it, it would not bind the company.

The COURT: The objection is overruled and exception allowed.”

II.

The Honorable Circuit Court erred in overruling the motion of the defendant for a non-suit made at the close of the evidence of the plaintiff.

III.

The Honorable Circuit Court erred in overruling the motion of the defendant for an instructed verdict made at the close of all the evidence in the case.

IV.

The Honorable Circuit Court erred in instructing the jury as follows:

“If you find that at the time of the injuries complained of in the complaint, and for sometime prior thereto, children and other persons were in the habit of continuously going upon the premises in question and into the box cars situate upon the defendant’s track and sweeping the wheat up and gathering the wheat from in and about said cars, and if the defendant, its servants and employees knew of such custom or by the exercise of ordinary care and observation could have known of it, then I instruct you that the

defendant Railroad Company owes the duty to persons so going upon the cars or track to use reasonable care to avoid injuring them. By reasonable care is meant that degree of care that an ordinarily prudent man would use under like circumstances and conditions. The degree of care to be exercised may be measured by the danger to be apprehended.

You are instructed that in determining whether or not the defendant, its servants and employees were guilty of negligence causing the accident, and in measuring the standard of care to be used by the defendant and its servants and employees at and about the point where, and the time when the accident occurred, you should take into consideration the custom and habits of children and the public generally in going in and upon the cars and tracks of the defendant for the purpose of getting wheat, and that due and ordinary care should be used to prevent accidents to not only men and women of mature age and experience, but also to children of tender years who might have occasion to be in or about said cars, or might have been in the habit of being in or about said cars."

V.

The Honorable Circuit Court erred in overruling the motion of the defendant for judgment notwithstanding the verdict.

WHEREFORE defendant, plaintiff in error, prays that the judgment of the Honorable Circuit Court of the United States for the Western District of Washington, Western Division, be reversed and

that such directions be given that full force and efficiency may inure to the defendant by reason of its defense to said cause.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

(Acceptance of service.)

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Petition for Writ of Error

The defendant, the Northern Pacific Railway Company, feeling itself aggrieved by the verdict of the jury and the judgment entered therein in the above entitled cause, comes now by its attorneys and petitions this Honorable Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish

upon said Writ of Error and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Defendant.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Order Allowing Writ of Error

Upon motion of J. W. QUICK, attorney for the above named defendant, and upon filing a petition for a Writ of Error and Assignment of Errors as required by law, it is hereby

ORDERED, that a Writ of Error be and is hereby allowed to have reviewed in the Honorable United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein; and it is further ordered that the amount of bond on said Writ of Error is hereby fixed at the sum of FIVE THOUSAND Dollars to be given by the defendant, and on the giving of said bond the judgment heretofore

rendered will be superseded pending the hearing of of said cause in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed, this 5th day of December, 1911.

FRANK H. RUDKIN,
Judge.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 5 1911
JAMES C. DRAKE, Clerk.”

Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS :

That we, Northern Pacific Railway Company, a corporation, as principal, and National Surety Company, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiff in the above action in the sum of Five Thousand Dollars (\$5,000.00), for which sum well and truly to be paid to the plaintiff, his executors, administrators and assigns we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of December, A. D. 1911.

The condition of this obligation is such that whereas, the above named defendant, Northern Pacific Railway Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reserve the judgment in the above entitled cause by the Circuit Court of the United States for the Western District of Washington, Western Division, and whereas, the said Northern Pacific Railway Company desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals, for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above named Northern Pacific Railway Company, a corporation, shall prosecute said Writ of Error to effect and answer all costs and damages awarded against it, if it fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Northern Pacific Railway Company and said surety for the amount of such costs and damages awarded against said Northern Pacific Railway Company and this obligation to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY.

(SEAL.)

BY GEO. T. REID,

Its Attorney.

NATIONAL SURETY COMPANY.

By W. H. OPIE,

Attorney in Fact.

Approved this 6th. day of December, 1911.

FRANK H. RUDKIN,

Judge.

(Endorsed) :

“FILED

U. S. CIRCUIT COURT

Western District of Washington

DEC 6 1911

JAMES C. DRAKE, Clerk.”

Writ of Error

UNITED STATES OF AMERICA,
THE PRESIDENT OF THE UNITED STATES
OF AMERICA, TO THE HONORABLE THE
JUDGES OF THE CIRCUIT COURT OF THE
UNITED STATES FOR THE WESTERN DIS-
TRICT OF WASHINGTON, WESTERN DIVIS-
ION.—GREETING.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the Northern Pacific Railway Company, a corporation, Plaintiff in Error, and Tony Curtz, a minor by Agnes Curtz, his Guardian ad litem, Defendants in Error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, under your seal, dis-

tinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit in thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

WITNESS THE HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 6th. day of December, A. D. 1911, together with seal of said Court.

(SEAL) JAMES C. DRAKE,
Clerk of the Circuit Court of the United States for
the Western District of Washington.

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 7 1911
JAMES C. DRAKE, Clerk.”

Citation

THE UNITED STATES OF AMERICA,
THE PRESIDENT OF THE UNITED STATES
OF AMERICA, TO TONY CURTZ, a minor, by
AGNES CURTZ, his Guardian ad litem, Defend-
ants in Error.—GREETING.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the Court room of said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Washington, Western Division, wherein, Northern Pacific Railway Company, a corporation, is plaintiff in error, and Tony Curtz, a minor by Agnes Curtz, his Guardian ad Litem, is defendant in error, to show cause if there be any, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of said Court, this 6th. day of December, A. D. 1911.

(SEAL.) FRANK H. RUDKIN,
Judge of the United States District Court for the Western District of Washington, presiding in Circuit Court of the United States for the Western District of Washington.

Service of above accepted this 7th. day of December, A. D. 1911.

BATES, PEER & PETERSON,
Attorneys for Plaintiff.”

(Endorsed) :

“FILED
U. S. CIRCUIT COURT
Western District of Washington
DEC 6 1911
JAMES C. DRAKE, Clerk.”

Clerk's Certificate

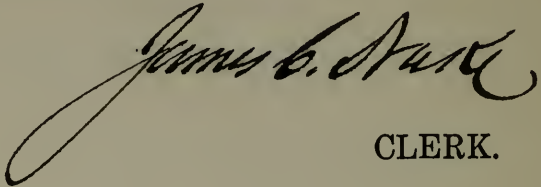
UNITED STATES OF AMERICA, WESTERN
DISTRICT OF WASHINGTON.—ss.

I, JAMES C. DRAKE, Clerk of the United States Circuit Court for the Western District of Washington, do hereby certify that the foregoing papers are a true and correct copy of the record and proceedings in the case of TONY CURTZ, a minor, etc., plaintiffs, versus NORTHERN PACIFIC RAILWAY COMPANY, a corporation, defendant, as the same remain on file and of record in my office.

I further certify that I hereto attach and herewith transmit the original Citation and Writ of Error issued in said cause.

I further certify that the cost of preparing and certifying the foregoing record to be the sum of \$104.00, which sum has been paid to me by the attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of this said Court, at the City of Tacoma, in said District, this 22nd day of December, A. D. 1911.

A handwritten signature in cursive script, reading "James B. Smith". The signature is written in dark ink and is positioned above the printed title "CLERK.".

CLERK.